STATE OF MICHIGAN

COURT OF APPEALS

JEN-KEL CONSTRUCTION CO., INC.,

Plaintiff-Appellant,

v

CITY OF HOLLAND and HOLLAND BOARD OF PUBLIC WORKS,

Defendants-Appellees.

UNPUBLISHED
March 9, 2006

No. 257856
Ottawa Circuit Court
LC No. 02-042329-CK

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

This dispute arises from construction contracts for installation of a water system. Plaintiff filed suit for breach of contract and misrepresentation. In response, defendant[1] alleged that plaintiff had not performed the contract to specifications and requested liquidated damages. Following a bench trial, a judgment against defendant in the amount of $42,202.59 plus judgment interest and costs was rendered. Plaintiff appealed as of right, and we affirm.

Plaintiff was the winning bidder for installation of a water main project with defendant that was divided into two segments, the "64th and M-40 Water System Improvements" ("M-40") project and the "Blue Star Highway Water System Improvements ("Blue Star"). During the course of performance of the contracts, modifications and extensions of time were to be submitted in writing for resolution between the parties. The engineer for the project, OMM Engineering, Inc., (OMM) decided any dispute that could not be resolved by the parties. Aside from these basic facts, the parties' version of events diverged substantially. Plaintiff alleged that defendant's representatives had to modify the plans before construction could begin because the project, as specified, was to be built on property that defendant did not own. Furthermore, although the contracts called for project completion by November 30, 2000, plaintiff alleged that the date was impossible to perform because of the time frame of closure of the asphalt plants. Plaintiff asserted that, during pre-construction meetings, defendant did not indicate that there was a sense of "urgency" for completion by November 30, 2000. On the contrary, defendant's

[1] Although there are two named defendants, the pleadings repeatedly utilized the singular "defendant" to refer to the entities. Accordingly, our opinion will also address "defendant."

witnesses testified that plaintiff was advised that an extension of time should be requested if deadlines could not be met. Representatives of OMM testified that plaintiff was advised that defendant had enforced liquidated damage provisions in other contracts.

Plaintiff's principal representative, Mark Alan Segard, and its expert opined that the project segments were impossible to perform based on the weather conditions and dates of availability of asphalt. Plaintiff also alleged that defendant's changes to the project caused delay and product changes and returns. Segard testified that he completed the project and the punch list items. Defendant's witnesses testified that plaintiff was aware of the need for the timely completion of the project and that modern equipment allowed construction work to be performed year round. Defendant's witnesses also testified that plaintiff was aware of the need for timely completion of the project, but did not employ additional work crews or work on both segments simultaneously. Defendant's witnesses testified that plaintiff did not respond to requests to complete the project, causing it to hire another entity to complete the punch list items.

Following a bench trial, the court's factual findings indicated that plaintiff's version of events was rejected because it was concluded that plaintiff had not complied with the contractual provisions for modification of the projects. For example, the trial court rejected plaintiff's reasons for failing to complete the project on time, which included plan changes, poor weather, and verbal assurances of lack of urgency. Consequently, the trial court reached a judgment in favor of plaintiff by computing the amount due and owing on the contract for completed items, less the cost of the punch list items, with an award of liquidated damages to defendant.

Plaintiff alleged that the trial court erred in its rulings regarding summary disposition. We disagree. Appellate courts review summary disposition decisions de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in support of and in opposition to a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff first alleges that the trial court erred in denying its motion for summary disposition of defendant's claim to liquidated damages.[2] Plaintiff alleged that defendant's various breaches of contract did not entitle it to liquidated damages. Review of the trial court's ruling reveals summary disposition was denied because the application of the law regarding

[2] We note that plaintiff's brief on appeal does not comport with the requirements of MCR 7.212(C)(6), requiring the presentation of both favorable and unfavorable facts without argument or bias. Additionally, plaintiff relies on its brief filed in the lower court regarding the entitlement to summary disposition. The brief is not contained in the lower court record.

liquidated damages was contingent on the actions of the parties and the credibility of the witnesses. Indeed, the trial court's factual findings at trial had to apply the different versions of events to the applicable law. Accordingly, we cannot conclude that the trial court erred in denying plaintiff's motion for summary disposition. *Quinto, supra*.

Plaintiff next submits that the trial court erred in granting defendant's motion for summary disposition based on change order number four when the order was ambiguous and did not comport with the parties' intent. We disagree. The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). If the contract language is clear and unambiguous, its meaning presents a question of law for the courts to determine. *UAW-GM Human Resource Center v KSL Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). If the terms of a contract are subject to two or more reasonable interpretations, a factual development occurs for which it is necessary to determine the intent of the parties. *SSC Associates Limited Partnership v Detroit General Retirement System*, 192 Mich App 360, 363; 480 NW2d 275 (1991). The duty to interpret the law on contracts presents an issue for the court to decide, not the parties' expert witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997).

During the boring process, construction had to be temporarily stopped because the composition of the location was rock, and an alternative process had to be utilized to complete the project. Change order number four was prepared to reflect this alteration to the construction plans. This change order provided, in relevant part:

> Jen-Kel will install 220' of 26" casing based on time and material at an hourly rate of $660.00 per hour for a maximum of 50 hours for an estimated amount of $33,000.
>
> An additional adjusting change order will be completed after the installation of the 26" casing and the Contractor, the City of Holland, and OMM Engineering, Inc. agree to the amount of time required to do the actual work.
>
> The Contractor requests a time extension where work will be substantially complete by May 8, 2001 and complete and ready for final payment in accordance with paragraph 14.13 of the General Conditions on or before June 15, 2001. This date was agreed upon by the Contractor, The City of Holland, and OMM Engineering.
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> **JUSTIFICATION**: Item No. 44 through 46 were requested by the contractor in a letter on March 22, 2001 and at a meeting on March 26, 2001 and are the results of unforseen [sic] conditions while boring the casing under I-196. Both the Contractor and the City of Holland agree that these items will address all issues for Equipment (30" Rockhead, Rockteeth, 2 repairs to the Output shaft & gear, 30 C.U. 1" stone and electrical for pump), Labor and Expenses (197 ½ hours of labor), that occurred during the boring process. The time extension is for weather conditions and unforseen [sic] conditions.

> This document shall become a modification to the Contract and all provisions of the Contract shall apply thereto.

It should be noted that Mark Segard signed this document on April 3, 2001. Despite this document, plaintiff alleges that it was not precluded from seeking additional compensation over and above the fifty hours allotted for this alteration to the contract. However, the plain language of this change order, which became a modification of the original contract by its own terms, set an "hourly rate of $660 per hour for an maximum of 50 hours for an estimated amount of $33,000." Moreover, the justification portion of the contract indicated that this provision addressed all issues including labor and expenses. Plaintiff alleged that it was the parties' intent to be entitled to seek compensation in excess of the 50 hours if it was required. On the contrary, the plain language on the four corners of the document indicates that only 50 hours would be allotted. There is no indication that additional hours would be allocated for this aspect of the project. Segard signed this document, and it does not contain an ambiguity on its face that requires consideration of the parties' subjective intent taken from their deposition testimony. *Old Kent Bank*, *supra*. Therefore, the trial court did not err in granting the defense motion for summary disposition with regard to this issue.

Plaintiff also alleges that the trial court erred in granting partial summary disposition with regard to change order number five. We disagree. Change order number five provided that $33,000.00 was an increase in the contract price for installation of 220' of 26" casing, time and material with a payment of $660 per hour with hours expended at $33,000. The trial court held that this change order reflected the changes contained in change order number four, finalizing and reducing to writing any cost adjustments from this phase of the project. The trial court then denied the motion to the extent there was a question of whether Segard's father had authorization to sign this order.

Plaintiff alleges that the trial court was mistaken that the change orders could finalize the issue because there was no "finaling" out of the project. Plaintiff's position did not preclude the grant of summary disposition. The agreement provided that plaintiff was entitled, under the terms of the contract, to seek additional compensation when ordered work was altered in time or manner due to unforeseen circumstances. Plaintiff could seek that compensation by submitting a written request. If defendant did not agree to the request, the issue would be submitted to the engineer, OMM, for a decision. Additionally, the defense witnesses testified that plaintiff was entitled to stop the project to get a ruling on an issue before continuing. Plaintiff approved the document indicating that "a maximum of 50 hours" was allotted for ramming the 26" pipe. There was no indication that plaintiff submitted a written request for a change order to reflect that the process went over and above that 50 hour maximum. Simply put, the plain language of the document was properly interpreted by the trial court. *Hottmann*, *supra*. Plaintiff had other avenues to pursue, specifically raising the equitable provisions of the contract with the engineer, to obtain compensation if the change orders did not adequately address the circumstances of completion of a phase of the project. Under the circumstances, the trial court properly granted the summary disposition motion in part.

Plaintiff next raises a litany of issues with regard to the award of liquidated damages. We conclude that these issues are without merit. A trial court's damage award in a bench trial is reviewed for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). "Clear error exists where, after a review of the record, the reviewing court is left

with a firm and definite conviction that a mistake has been made." *Id*. However, it is the function of the trier of fact to resolve questions of credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). A damage award is not clearly erroneous where the damage award was within the range of evidence presented, and the trial court was aware of the issues in the case and appropriately applied the law. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 516 ; 667 NW2d 379 (2003). In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement. *Davidson v General Motors Corp*, 119 Mich App 730, 733; 326 NW2d 625 (1982) mod on reh 136 Mich App 203; 357 NW2d 59 (1984). "The proper measure of damages for breach of contract is, therefore, the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Id*. The intent of an award for damages in a breach of contract action is to place the plaintiff or counterplaintiff in as good a position as he would have occupied if the terms of the contract had been fulfilled. *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 62 Mich App 405, 412; 233 NW2d 598 (1975). The value of performance and damages should be equal. *Id*. at 412-413. However, the injured party should not obtain a windfall; that is, he should not be placed in a better position as a result of any breach. *Id*. at 413. Thus, any mitigation or savings to the injured party should be deducted from any award. *Id*. A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in case of a breach. *Papo v Aglo Restaurants*, 149 Mich App 285, 294; 386 NW2d 177 (1986).

Plaintiff alleged that defendant was not entitled to liquidated damages because the contract was impossible to perform, defendant breached the contract first, defendant sought its own extension of time to complete the project, and defendant waived strict compliance with the contract. We disagree. As an initial matter, we note that the trial court did not render factual findings in support of plaintiff's claims of error. Moreover, we cannot conclude that the trial court's factual findings were clearly erroneous. *Marshall Lasser, supra*. The trial court was presented with divergent factual scenarios and found in defendant's favor. On this record, we cannot conclude that error occurred. Moreover, the contract contained express provisions setting forth that changes to the contract were to be submitted in writing, and disputes were to be submitted to the engineer. Under the circumstances, the challenge to the award of liquidated damages is without merit.

Plaintiff next alleges that defendant should not be awarded damages for payment of punch list items, defendant breached the contract, and plaintiff was owed additional funds for retainage and unpaid work. A damage award is not clearly erroneous where the damage award was within the range of evidence presented, and the trial court was aware of the issues in the case and appropriately applied the law. *Alan Custom Homes, supra*. The damage award should place the plaintiff or counterplaintiff in the position he would have occupied if the terms had been fulfilled. *Goodwin, supra*. The trier of fact resolves issues addressing credibility and intent. *Triple E Produce, supra*. Review of the record reveals that the trial court appropriately applied these principles. Plaintiff's claimed errors are contrary to the factual findings of the trial court, and we cannot conclude that the trial court's factual findings were clearly erroneous. *Marshall Lasser, supra*.

Lastly, plaintiff alleged that there was an accord and satisfaction with regard to the payment for watermain through casing. We disagree. Whether a particular set of facts rises to

the level of an accord and satisfaction generally presents a fact question for the trier of fact. *Fritz v Marantette*, 404 Mich 329, 334-335; 273 NW2d 425 (1978). Again, the contract provided that the parties could dispute changes and submit the changes to the engineer. Although documentation indicated the payment at $69 per linear foot for this service, defendant protested the change, and OMM resolved the dispute in defendant's favor. The trial court also found that the change to the payment for this service was appropriate. We cannot conclude that this decision was clearly erroneous. *Fritz, supra*.

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood